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IN THE

Supreme Court of the United States

WILLIAM O. SCHISM AND ROBERT L. REINLIE,
Petitioners,

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE MILITARY OFFICERS ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Military Officers Association of America hereby submits this brief, *amicus curiae*, in support of petitioners and urges the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit and reverse the decision below. The parties to this proceeding consent to the filing of this brief.[1]

INTEREST OF *AMICUS*

The Military Officers Association of America is a not for profit corporation that is dedicated to serving and protecting

[1] No counsel for a party authored this brief in whole or in part and no entity other than MOAA has made a monetary contribution to the preparation or submission of this brief.

the interests of past and present active, reserve and retired commissioned and warrant officers in all seven of the uniformed services. Founded in 1929, MOAA now has a membership of approximately 400,000 current and former officers and their survivors. MOAA's mission is to support a strong national defense and to represent its members' interests before Congress and, on rare and extreme occasions, before courts of the United States.

The decision in this case will have a direct impact on thousands of MOAA's members, who, like the petitioners, relied upon the promise of life-long medical care in deciding to devote their careers to military service. More profoundly, the decision in this case will affect all of MOAA's members, as well as all current, past and even prospective members of the Armed Forces. At issue in this case is the very honor and integrity of the United States government—whether the government must honor the commitments it has made to its soldiers or whether, through legal machinations and gyrations, it can shirk its obligations and dishonor its word. MOAA submits this brief *amicus curiae* in support of the petitioners to urge this Court to reject the government's ignominious arguments and instead hold the government to its promises.

STATEMENT

Petitioners are military retirees, who, like countless thousands of their contemporaries, were offered life-long medical care while on active duty in the Armed Forces of the United States as an inducement to devote career service to the military. They accepted this offer and dedicated the majority of their working lives to military service. Lately, and in particular since the adoption by the Department of Defense of TRICARE in 1995, the government has reneged on this promise. This suit arose as a breach of contract case to challenge the government's abdication of its promise.

Since at least the days of Patrick Henry, Americans have believed that "[t]he ideas of liberty and equality . . . are worth fighting for." *Texas v. Johnson*, 491 U.S. 397, 439 (1989) (Stevens, J., dissenting). Our Nation was wrested from tyranny with the lives and blood of patriots and it has survived into its third century because some Americans, when called to duty, were prepared to lay down their lives in defense of this Nation and the ideals upon which it was built.

As far back as the presidency of George Washington, the United States assured those citizens who dedicated their lives to a career in the Armed Forces that medical and dental care would be provided for them. *See Schism v. United States*, 19 F. Supp. 2d 1287, 1293 (N.D. Fla. 1998) (citing, among other statutes, the Act of March 2, 1799 (Sec. 4808, Rev. Stat.)). This promise has so worked its way into the fabric of military life that, time and time again, Congress has recognized its "moral obligation" to live up to this promise. *See e.g. Hearings on CHAMPUS and Military Health Care Before the Subcomm. No. 2 of the House Comm. on Armed Services*, 93rd Cong., 2d Sess. (1974).

Throughout the twentieth century, the promise of lifetime medical care was a cornerstone of military recruitment. Recruiters repeatedly promised military members that lifetime medical care would be one of the modest benefits provided to them in exchange for their military service. In fact, a Department of Army survey found that, "enlisted personnel rated the provision of medical benefits the single, strongest influence in their decision to stay in the Army." *See Hearings on CHAMPUS and Military Health Care Before the Subcomm. No. 2 of the House Comm. on Armed Services*, 93rd Cong., 2d Sess. 59 (*quoting* "Survey Estimate of Retention of Army Personnel") (1974).

In 1974, a special subcommittee of the Committee on Armed Services was convened to study issues surrounding

the government's obligation to fulfill this promise of lifetime medical care. Citing back to congressional studies conducted a decade earlier, the Subcommittee concluded:

> Retired personnel and their dependents have been traditionally granted medical care in uniformed services facilities. A special subcommittee of this committee, chaired by the Honorable Mendel L. Rivers of South Carolina, concluded after an extensive study of military hospital policy in 1964, that the government has a clear moral obligation to provide medical care to retired personnel and their dependents. That subcommittee found that *such care had been assured by custom and tradition through most of the life of the Republic*. That subcommittee also found numerous examples of recruitment and retention literature which pledged that the government would provide medical care for the man and his family following retirement.

See Hearings on CHAMPUS and Military Health Care Before the Subcomm. No. 2 of the House Comm. on Armed Services, 93rd Cong., 2d Sess. 22 (1974) (emphasis added). In testifying before Congress in 1974, the Surgeon Generals of the Army, Navy and Air Force testified that they agreed with these congressional findings. *See id.* at 118 (testimony of Lt. Gen. R. R. Taylor). In follow-up questioning regarding the government's obligation to provide the entitlement at issue in this case, Surgeon General Taylor testified, "[w]hen I read title 10 of the United States Code, I think it spells out very clearly a legal requirement." *Id.* at 119. Congress subsequently directed the military departments that when programming space for medical care they should consider the need to provide treatment for retirees and their dependents as well as active military members. *See Hearings on Military Medical Benefits as Proposed in H.R. 9271, H.R. 13582, and H.R. 13583 Before Subcomm. No. 2 of the House Comm. on Armed Services*, 89th Cong., 2nd Sess., 5739 (1966).

For the most part, until very recently, the military departments did provide the promised care. But in 1995, the Secretary of Defense issued regulations implementing a new system called "TRICARE." Under this system, retirees under the age of 65 could maintain their prior eligibility for treatment at military facilities, but only upon payment of a substantial premium. Retirees over the age of 65 no longer were eligible for treatment at military facilities. They were relegated solely to Medicare, eligible for outpatient benefits (Medicare Part B) only upon payment of a premium, and stripped of any prescription drug benefit. Thus, far from enjoying lifetime medical care, military retirees became the only American employees who lost their health insurance coverage altogether when they reached age 65. For those retirees living on a fixed income, and in particular spouses of deceased service members, these decreased benefits and new costs came just when they needed these benefits most.

The court below recognized that military recruiters, under direction of their superiors, promised lifetime medical care as an inducement for career service. So too, it noted, as the government conceded, that these promises were made in good faith and relied upon. Pet. App. 1a-2a. The court characterized the question before it as "whether the government is bound by these promises." Pet. App. 2a. In MOAA's view merely to ask this question is to answer it—how could it possibly be that the government is not bound by its word?

REASONS FOR GRANTING THE PETITION

This case raises questions of substantial public importance concerning the responsibility of our government to its citizens and in particular its obligations to honor its promises to pay for services rendered. The importance of this case is not limited to the perhaps one-and-a-half million military retirees

and their spouses who, like petitioners, had relied on the government fulfilling its obligations. Nor is it limited to the million-plus members of the Armed Services today who are watching this case to gauge how they can expect the military to fulfill its obligations to them, or the countless potential military recruits whose decisions to pursue a military career may turn on how the government honors its commitments to these military retirees. Rather, this case, arising as it does and when it does, is significant to all Americans. As our military forces are now deployed in hostile arenas across the world, newly-liberated people are being asked to trust the United States to help them establish their own governments. Thus, in this new age, where terror has been brought to our shores, the honor and integrity of the United States has never been at a higher premium. Review by this Court is necessary to assure all Americans, and the world, that the unequivocal answer to the question whether this government is bound by its promises is a resounding "yes."

1. "Great nations, like great men, should keep their word." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). This simple and inarguable admonition should dispose of this case; review by this Court is necessary to assure that it does.

That military recruiters induced soldiers to commit to career service with promises of lifetime medical care is so thoroughly established in the record of this appeal that the government had no choice but to concede this point. Nor can there be any dispute that the government has a "moral obligation" to provide the promised care. *See e.g., Hearings on CHAMPUS and Military Health Care Before the Subcomm. No. 2 of the House Comm. on Armed Services*, 93rd Cong., 2d Sess. 295 (1974).

Notwithstanding the undisputed factual and moral obligations, the government argued, and the court below accepted, there was no *legal* obligation to honor these commitments. The court below professed great sympathy for petitioners:

> We cannot readily imagine more sympathetic plaintiffs than the retired officers of the World War II and Korean War era involved in this case. They served their country for at least 20 years with the understanding that when they retired they and their dependents would receive full free health care for life. The promise of such health care was made in good faith and relied upon.

Pet. App. 69a. But rather than wringing its hands and passing the buck to Congress, the government and the court below should have striven for ways to honor the promises made. Yet the government contrived arguments to allow it to shirk its responsibility and the court below all too willingly bought into these arguments.

For example, the government argued, and the court held, that there was no statutory authority for the government to make the promises that it made and upon which the petitioners relied. But of course there is statutory authority in 5 U.S.C. § 301, which provides that

> [t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

Rather than accept the plain command of this statute, the court below denigrated it as a "housekeeping statute," Pet. App. 31a, as if that somehow would change the rules of statutory construction (and separation of powers). It concluded that this statute was adequate to authorize "space available" care, but inadequate to create an "entitlement" to care. *Id.*

Neither the court below nor the government provided any textual support for this attenuated distinction. Certainly this Court is familiar with entitlements being born from regulations. *See e.g. Service v. Dulles*, 354 U.S. 363, 373-76 (1957) (where dismissal from employment is based on defined procedure, even though generous beyond the statutory requirements binding the agency, those procedures must be observed); *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959) (employee who has no statutory entitlement to continued service nonetheless entitled to protections of departmental regulations); *Morton v. Ruiz*, 415 U.S. 199, 234 (1974) (entitlement to benefits flowing from agency regulations). But the court below recognized that until 1966 this statute was the *sole* statutory authority for the provision of health benefits to military retirees. Pet. App. at 35a. Indeed, the government conceded that 5 U.S.C. § 301 was in part the statutory predicate for the enactment of CHAMPUS in 1966. Pet. App. 79a. Thus, it is a stretch, to say the least, that this statute could not support the promises of lifetime medical care made to induce career service. As Chief Judge Mayer observed in his dissent, it is "incongruous that section 301 could support creation of a comprehensive military health care program, but not support contracts for care." Pet. App. 79a.

In a similar vein, the court below went out of its way to hold that even if 5 U.S.C. § 301 authorized the promise of lifetime medical care, nonetheless that authority would be trumped by the Anti-Deficiency Act. Pet. App. 47a. How the Anit-Deficiency Act could retroactively remove authority for the military departments to make inducements to its members is not readily apparent. But even if this were so, Congress subsequently enacting legislation that nullified the existing contracts would still constitute a compensable breach of contract. Indeed, this is precisely the issue this Court decided in *United States v. Winstar*, 518 U.S. 839, 883 (1996).

The decision below is inexplicable on a very fundamental level: How could the government not be held to promises it made after the military retirees performed their obligations under the contract? To be sure, there are instances where the government cannot be estopped, *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), or where it cannot be held to a contract where the person ostensibly acting for the government lacked actual authority. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). But here, there is no question of estoppel and no question that the recruiters had the authority from their department heads to make the promises they made. It is simply implausible that the military department heads, whose decisions in these matters would ordinarily be entitled to substantial deference, were wrong for all these years in believing that Congress had authorized them to use lifetime medical care as an inducement for career service.

The decision below, and the government's arguments to support it, stand on its head Justice Black's exhortation that "[g]reat nations, like great men, should keep their word." The court below should have viewed the government's hypertechnical and attenuated arguments with skepticism. Because it failed to do so, it allowed the government simply to walk away from promises it made to over one million servicemen it induced to make a career out of laying their lives on the line to defend our freedom. Review by this Court is necessary to assure that Justice Black's words remain the polestar in gauging the government's conduct and do not become an empty platitude.

2. In a similar vein, the court below erred in refusing to give petitioners the benefit of the doubt when resolving this otherwise open question. This Court has held that "provisions for benefits to members of the Armed Forces are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991). Review by this Court is

necessary to reaffirm the imperative of this rule of statutory construction especially as it applies in a court that has exclusive jurisdiction over many veterans' issues.

It is well settled that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Yet the court below gave the military retirees no such benefit. For example, relying on dicta in this Court's decision in *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1981), the court below construed 5 U.S.C. § 301 narrowly and held that it did not authorize the military secretaries to offer lifetime medical care. Yet the court could as easily have relied on *Georgia v. United States*, 411 U.S. 526, 536 (1973), in which this Court held that 5 U.S.C. § 301 "is surely ample legislative authority" for regulations adopted by the Attorney General to implement the Voting Rights Act. *See also Nigro v. Sullivan*, 40 F. 3d 990, 996 (9th Cir. 1994) (construing 5 U.S.C. § 301 as delegating "authority to the executive to establish substantive rules.").

The court below erred in failing to adopt a broad interpretation of 5 U.S.C. § 301—because the issue before it involved the rights of armed services retirees, the court below was required to resolve doubt in the retirees' favor. In failing to do so, it ignored the explicit command of this Court's decisions in *Brown v. Gardner* and *King v. St. Vincent's Hospital*. The decision below has deprived over a million military retirees and their spouses of health benefits they earned and in many case they cannot replace. Review by this Court is necessary to assure that these military retirees and their spouses are granted the deference their service and sacrifice entitle them.

3. This case comes before the Court at time of unparalleled threat to our Nation and to our interests around the world. Hundreds of thousand of Armed Services personnel are currently deployed in combat arenas half-way around the world ferreting out terrorism and keeping our homeland safe.

These men and women are risking their lives to free oppressed people, to lay the groundwork for the installation of stable, democratic governments, but, first and foremost, to protect us.

In stark contrast to what our military is doing for us, and what petitioners and their counterparts have done for us in the past, the court below has sanctioned the government's immoral and ignoble breach of its promise to World War II and Korean War military retirees. Indeed, the government's conduct in this matter is nothing short of a national disgrace—in the face of a moral and factual obligation to honor its commitments, rather than live up to its promises it has searched for ways to avoid them. It is indeed a sad commentary that the government's response to this problem has been to send out its best and brightest, not to fix the problem, but instead to defend the government's factually and morally indefensible actions. With the stroke of a pen, this or the past administration could have averted this travesty. But instead, petitioners and their counterparts, including survivors of those killed in action, those wounded or maimed in combat or those held for years and tortured in prisoner-of-war camps, have been met with an arsenal of Justice Department lawyers concocting reasons why the government does not have to honor its word.

This case is of immense importance to the million-and-a-half military retirees whose health care hangs in the balance. But it is equally important to our men and women serving overseas today who have put themselves in harm's way and taken up arms in our defense. We all pray for their safe and speedy return and the successful accomplishment of their mission. But it is not enough to hold parades or tie yellow ribbons, or, as did the court below, espouse our sympathy for the plight of soldiers once need for their services have passed. We must honor their commitment and sacrifice by assuring that the government honors its commitments to them. Thus,

review by this Court is necessary to assure our servicemen, today's and yesterday's, that we stand behind them just as they have stood for us.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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